STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE VanCONETT ESTATE

FLOYD RAU, Personal Representative of the Estate of HERBERT L. VanCONETT, Deceased; JOYCE ANN FLORIP; KAREN JEAN PETERSON; and SANDRA LEE PARACHOS,

Plaintiffs- Appellants,

vs.

ELIZABETH M. LEIDLEIN and MARIANNE DURUSSEL,

Defendants-Appellees.

Supreme Court
File No. 126758

Court of Appeals
File No. 247516

Saginaw County
Probate Court
File No. 01-111943-DE-CZ

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APPELLANTS' REPLY BRIEF

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1. **Appellants have never argued that the parties' mutual will contract restricts the surviving spouse's interest in the realty to a life estate.**

Appellee states, "*In order to create a life estate, one must so designate it as a life estate in the conveying document. The document in issue is the last will and testament of ILA R. VanCONETT. . . Nowhere in their respective wills does either party limit the survivor's interest to that of a life estate. . . Appellants have not cited any Michigan cases after July 1, 1979 supporting their contention that HERBERT L. VanCONETT was restricted to a life estate because of the VanCONETT's mutual wills.*" (Emphasis Added) (Appellee's Brief, Issue II, Page 11) Under Issue IV, Page 17, Appellee states: "*Appellee has found no secondary sources discussing Michigan law subsequent to July 1, 1979 that support Appellants' contention that Herbert L. VanConett was limited to a life estate because the parties had entered into mutual wills.*" (Emphasis Added)

Appellee is well aware that this was not Appellants' contention in either the Probate Court (***Appendix 135a***) or before the Court of Appeals (***Appendix 174a***). On Page 43 of Appellants' Brief on Appeal to the Court of Appeals, Appellants set forth their position on this issue as follows:

> "Upon the death of ILA R. VanCONETT, decedent became the sole surviving joint tenant of the subject property. Clearly, Mr. VanConett had the right during his lifetime to use the real property in question as he saw fit. This included the right to sell it and then use the proceeds for any purpose necessary for his support and comfort. However, he did not have the right, as he did in this case, to give it away and dispose of it by deed operating as a testamentary disposition. To hold otherwise would nullify the purpose of executing joint reciprocal Wills and would render them worthless."

Appellee also asserts that the actions of F. H. Martin in drafting the Quit-Claim Deeds of May and June, 1996 after ILA VanCONETT's death was proof of HERBERT VanCONETT's right to dispose of assets during his lifetime ". . . *otherwise Mr. Martin would not have drafted the two*

deeds" (Appellee's Brief, Page 13) and *"otherwise what explanation is there for Mr. Martin's actions, the drafter of the wills and deeds?"* (Appellee's Brief, Page 14) These two deeds were done over seven years after the VanCONETT's Wills were executed and within seven months of F. H. Martin's death. (***Appendix 119a*** and ***142a***) It was Appellants' contention that had F. H. Martin realized or remembered HERBERT VanCONETT had executed his Will pursuant to a contract with his deceased wife, he would not have prepared those two Quit-Claim Deeds because he knew to do so would have been in violation of the parties' will contract. (***Appendix 142a***) This is especially true since it was the standard practice of the law firm when executing mutual Wills to explain to the parties the effects and ramifications of this contract provision by indicating:

"(a) That the will of each of them was being made pursuant to a contract or an agreement between them as husband and wife to devise all of their property in the manner and to the beneficiaries as designated in their respective will.

(b) That during their lifetime, each had the right to amend, revise or revoke the provisions of their separate wills. However, if neither did so, upon the death of one them, the will of the surviving spouse would become irrevocable for the reason that their wills had been made pursuant to a contract between them.

(c) That whatever property the surviving spouse still possessed at the time of his or her death would then be disposed of according to the terms of the will that of surviving spouse.

(d) That "**all our property**" meant just that - all of their property, no matter how owned, i.e. separately or jointly.

(e) **That during the lifetime of the surviving spouse, he or she could do with that property as he or she saw fit but the surviving spouse could not give away, gift or dispose of that property in a manner which would be inconsistent and thwart the intent of the parties as evidenced in their separate mutual wills.**

(f) **Further, that if they did so, then the designated beneficiaries under that will would have a cause of action to enforce the terms of the contract because the surviving spouse breached the contract pursuant to which that will was made.**" (Emphasis Added) (Affidavit of Fred Martin, Jr., ***Appendix 119a, 120a***)

2. **Appellants have never argued that it makes a difference whether the VanConetts held title to the realty in question as tenants by the entirety or as joint tenants with full right of survivorship as Appellee asserts in Issue VI.** (Appellee's Brief, Page 23)

In this case, the Wills of both HERBERT VanCONETT and ILA VanCONETT contain a provision stating that their respective Wills were made pursuant to a contract *"for the purpose of disposing of all our property, whether* ***owned by us as joint tenants****, as tenants in common or in severalty."* A "joint tenancy" encompasses an estate by the entirety. *Hoyt v. Winstanley*, 221 Mich 515, 518; 191 NW 213 (1922) As such, it doesn't matter whether the parties held the property as tenants by the entirety or as joint tenants with full right of survivorship. Either way, it is covered by the parties' Will contract. However, in this case, the parties held title as joint tenants with full right of survivorship and not, as alleged by Appellee, as tenants by the entirety.

3. **Jointly held property may be subject to a mutual will contract even though said jointly held property passed to the surviving joint tenant by operation of law.**

Appellee argues that when property is held by a husband and wife, as tenants by the entirety or joint tenants with full rights of survivorship, upon the death of the first spouse, the property passes to the surviving spouse by operation of law outside of and not subject to the parties' mutual Wills, and, therefore, Mr. VanCONETT was free to dispose of the realty as he desired. (Appellee's Brief, Issue V) Appellee relies on *Rogers v. Rogers*, 136 Mich App 125; 356 NW2d 288 (1984) and an unpublished Court of Appeal's decision, *Kraizman v Chaims*, 1998 WL 1991110 (Mich App), for that proposition. Appellee's reliance on those cases is misplaced. Actually *Rogers, supra*, supports Appellants' position. In that case, the Trial Court specifically found that the real property held by Charles and Faith Rogers, as tenants by the entirety "*was outside of the joint and mutual wills,* ***was***

not covered by the wills *and did not pass by virtue of it.*"(Page 130) However, the Court also indicated that said property would have been covered under the joint will if the will language had specifically so provided. As the Court of Appeals stated in its Opinion:

> "However, in its analysis, the trial court also held that with respect to **property held** by Charles and Faith **as tenants by the entireties**, such as the farm, it **would** only **be included under the joint and mutual will if the language of the will specifically so provided.**" (Emphasis Added) (Page 130)

The Court of Appeals then posed the question before it as follows:

> ". . . does the language employed in the joint will clearly indicate an intent to terminate and destroy the right of survivorship which inheres in the tenancy by the entireties." (Page 134)

The Court answered that question, "No" and stated:

> "Under the circumstances, we are not convinced that the parties intended to nullify the tenancy by the entireties and to have the farm pass under the will. On the contrary, we believe that by placing the ownership of the farm in their two names as tenants by the entireties, Charles and Faith Rogers intended that, upon the death of either, the farm would be owned solely by the survivor." (Page 136)

> "Under all of the circumstances present in this case, we are not inclined to disturb the findings of the trial judge. We do not believe that he clearly erred either in his findings or his analysis of the law and, consequently, we affirm the judgment." (Page 137)

In the instant case, however, the subject joint property is covered by the VanConett's Wills and the language of each Will does provide for its inclusion. Specifically, each Will described the property subject to the Will contract as "*all our property, whether owned by us as joint tenants, as tenants in common, or in severalty*". The VanConett's intent to include "jointly owned property" under their Will contract is clearly expressed and unambiguous.

Appellants do not dispute that jointly held property passes to the surviving joint tenant outside the Will and nothing needs to be probated. Appellants have never asserted and do not claim that the VanConett's could destroy the survivorship right of their joint tenancy through their Wills

or that the VanConett's wished to terminate their joint tenancy and destroy the survivorship rights attached to it. The VanCONETTs - by their act of contracting to dispose of all their property upon their respective deaths in a specified and agreed manner - did not terminate the joint tenancy of that property and/or change the property title in any way. While they were both alive, neither had given up any rights to either their separate and/or jointly held properties. While they were both alive, they both retained the right to rescind the contract. Had either done so, it would have put the parties back in the same position they were in prior to the contract ever having been made. However, the contract was not rescinded while they were both alive and, therefore, became irrevocable upon ILA's death.

The parties' contract did not sever the joint tenancy. It was the act of ILA's death that severed the joint tenancy of the property - not the contract itself. Once ILA VanCONETT died, then the title to that property solely vested in HERBERT VanCONETT and became subject to the provisions of **his** Will dealing with the disposition of their joint property. At that point, the parties' Will contract became irrevocable. From that point on, the beneficiaries of the contract have a vested right to see that the terms of that contract are carried out and/or enjoin the breach of that contract. Upon HERBERT's death, they have the additional vested right to the property which was subject to the terms of that contract, including the right to recover any property which had been conveyed, transferred, or gifted away in violation of that contract.

The real issue in this case is: Can the parties by a Will contract control the ultimate disposition of jointly titled real property? Michigan case law has answered that question, "Yes." In *Schondelmayer v. Schondelmayer*, 320 Mich 565; 31 NW2d 721 (1948), the Court found that "jointly" held property of a husband and wife was subject to the provisions of their joint mutual will. In that case, the parties' Will provided that the ownership of all their property go first to the survivor

and upon the survivor's death, then to their three sons. (Page 568) By the terms of that mutual Will, each of the three sons received, among other things, a designated farm. The Court specifically noted: "*Title to the real property which the three sons were to receive was held jointly as tenants by the entirety by Charles and Cathrin.*" (Page 568) Similarly, in *Getchell v. Tinker*, 291 Mich 267; 289 NW 156 (1939), the Court ruled that realty titled jointly in a husband and wife was subject to the terms of an agreement the Court determined was a mutual will contract.

By virtue of the parties' Will contract, the parties gave to the surviving spouse "a fee simple estate subject to condition." The condition in this case being one of "good faith" which does not include the right to give away said property or dispose of it in a manner inconsistent with the parties' Will contract providing for the ultimate disposition of that property upon the survivor's death. Conditional estates are recognized in Michigan and may be created by Wills. *"A fee simple estate may be absolute, that is, total or unconditional, or it may be subject to a condition. Conditional estates may be created by deed and by will." 1 Cameron, Michigan Real Property Law (3d ed)*, § 7.9, Page 266

For this Court to say that jointly titled property is not subject to a joint and/or separate but mutual Wills of a husband and wife, would, in effect, render mutual Wills worthless. Typically, mutual Wills are implemented by a husband and wife in a second marriage and/or by couples who have been married in excess of 20 years. As a practical matter and in most cases, the assets of husband and wife are jointly held. As such, upon the death of the first spouse to a mutual Will, that spouse's Will is never probated because there are no assets to probate. Title to the property would have passed to the surviving spouse outside of the Will by virtue of jointly held assets. Now, however, all the assets are solely in the surviving spouse's name. Once this happens, the importance

of the parties' contract regarding the eventual disposition of all the parties' assets becomes apparent. The ultimate disposition of that solely held property is why people enter into mutual Wills.

4. **The Estate does have legal standing to sue Appellee, MARIANNE DURUSSELL, seeking to set aside decedent's Quit-Claim Deed of May 31, 1996, regarding 5224 King Road, Brideport, Michigan**.

Appellee asserts that the Estate did not have standing to commence suit against Defendant DuRUSSELL since the realty in issue was not part of HERBERT VanCONETT's Estate because it had passed to him by operation of law. Appellee also asserts HERBERT VanCONETT had revoked his Will after his wife's death, thereby negating Mr. RAU's authority to act as the Personal Representative (Issue VII, Page 26). For the reasons set forth in #3 above, Appellants assert that the realty was subject to the parties' Will contract. FLOYD RAU, as Personal Representative of HERBERT VanCONETT's Estate is required to see that the terms of that Will are carried out, including, but not limited to, his right to, "*maintain an action to recover possession of, or to determine the title to, property*". MCL 700.3709.

Regarding the issue of revocation, Appellants would assert that MCL 700.2514 displaced case law that says *"it is the contract to make the will, not the will itself, which is irrevocable*" by the survivor after the death of a party to a mutual will. *Keasey v. Engles*, 259 Mich 178, 181; 242 NW 878 (1932) Contracts not to revoke a Will are now authorized by statute. MCL 700.2514(1) specifically states: "... *a contract* ... *not to revoke a will*... *may be established only by 1 or more of the following* ..." (Emphasis added) Similarly, MCL 700.2514(2) states: *"The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills*." (Emphasis added)

In this case, the Will of HERBERT L. VanCONETT contained the following provision:

> "**I hereby expressly acknowledge that this Will is made pursuant to a contract** or agreement entered into **between my wife, ILA R. VanCONETT, and myself** for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty, in the manner hereinabove in this, my Last Will and Testament, provided, and **I expressly declare that in the event my wife, ILA R. VanCONETT, shall predecease me, then and in that event, this my Last Will and Testament shall be irrevocable.**" (Emphasis Added) (***Appendix 7a***)

ILA R. VanCONETT predeceased her husband and upon her death, HERBERT L. VanCONETT's Will became irrevocable. Given the express language in their mutual Wills, the Court of Appeals' decision in this record cannot be reconciled with MCL 700.2514. In this case, both the Will of HERBERT VanCONETT and the contract with his wife upon which that Will was created became irrevocable upon his wife's death. As such, Appellants assert that HERBERT VanCONETT could not revoke his Will which by its terms had become irrevocable.

5. **The individual Appellants have established the existence of a contract allowing them to sue as third-party beneficiaries.**

Appellee contends that the parties' separate Wills do not contain the material provisions of a contract and decedent's acts to revoke his Will and his transfer of property after his wife's death demonstrate that the parties did not intend to form a contract. (Appellee's Brief, Issue VIII, Page 27) The Court of Appeals correctly concluded that the Probate Court erred in finding that no contract existed when it stated:

> "A review of the wills reveals a clear expression of the VanConetts' intent to enter a contract. Both wills state, "I hereby expressly acknowledge that *this Will is made pursuant to a contract or agreement.*" (Emphasis added.) Each will then states the material provisions of the contract, that the couple would dispose of their property in a manner expressed in their wills and that the surviving spouse's will would become irrevocable at the first spouse's death. Specific bequests present in each will provide additional contract provisions, and each will was signed. After review of the wills in light of applicable statutory and case law, we conclude that the VanConetts did create a contract to make a will. See *Foulks v. State*

Savings Bank, 362 Mich 13, 14, 16; 106 NW2d 221 (1960); *Schondelmayer v Schondelmayer*, 320 Mich 565, 571; 31 NW2d 721 (1948); *Rogers, supra* at 128. Also, when Ila VanConett died, the couple's agreement became irrevocable, and plaintiffs became vested with a right of action to seek specific enforcement of the VanConetts' contract. *Schondelmayer, supra* at 572, citing *Getchell v Tinker*, 291 Mich 267, 270; 289 NW 156 (1939)." (***Appendix 184a***)

In this case, a contract to make a Will was established by all three methods set forth in MCL 700.2514(1). Each will does state the material provisions of the contract and each will does contain an express reference to a contract. If the Court felt the terms of the contract were not set forth in the Will and/or were ambiguous and evidence was needed to ascertain the terms of the contract, then the statute allows for extrinsic testimony proving the terms of the contract. A reading of the Affidavits of Fred Martin, Jr. (***Appendix 118a***) and Lucy T. Belill (***Appendix 67a***) clearly provide the terms of the contract. Appellants would also note that MCL 700.2514(1) (c) provides the contract to make a will may be established by "*a writing signed by the decedent evidencing the contract*". In this regard, Appellants state: (a) a Will is clearly a writing; (b) decedent signed his Will; and (c) the Will evidences a contract As Fred Martin, Jr., in his Affidavit, stated ". . .*no separate document was prepared to evidence this contract; that the wills themselves are the contract.*" (Paragraph 8; ***Appendix 119a***)

Having established a contract, the individual Appellants, JOYCE ANN FLORIP, KAREN JEAN PETERSON and SANDRA LEE PARACHOS, have standing to bring this suit as third-party beneficiaries. *Carmichael v Carmichael*, 72 Mich 76, 85-86; 40 NW 140, 173 (1888); *Smith v Thompson*, 250 Mich 302, 305, 308; 230 NW 156 (1930); *Getchell, supra* at 270; *Schondelmayer, supra*, at 572; *Foulks v. State Savings Bank*, 362 Mich 13; 106 NW2d 221 (1960).

Finally, Appellee asserts that there was no consideration given by either VanCONETT's to the other or to the individual Appellants to support a contract. (Appellee's Brief, Page 28) That

issue was addressed in *Smith, supra*, wherein the Court stated:

> "It is conceded that none of the plaintiffs were present at the time the contract was made. The question presented is whether, when made for their benefit, they may enforce its provisions against the estate of the wife. The contract was a mutual agreement on the part of both husband and wife that certain relatives of both should be provided for in their wills. Each of them had an interest in its performance as affecting those who were near and dear to them. **The undertaking of each to perform was a sufficient consideration for the promise of the other**. . . The breach of it by the one cannot but operate as a fraud upon the other. The husband continued to rely upon the contract, and at his death all of his property passed to his wife under his will. While by mutual consent the contract might have been abrogated during the lifetime of the husband, at his death it became an irrevocable obligation on the part of the wife." (Emphasis Added) (at Page 305)

> "'Where an agreement is entered into by two persons, and especially by husband and wife, to make mutual and reciprocal wills disposing of their separate estates pursuant to their mutual agreement, and where mutual and reciprocal wills are made in accordance with that agreement, and where, after the death of one of the agreeing parties, the other takes under the will and accepts the benefits of said agreement, equity will enforce specific performance of said oral agreement and prevent the perpetration of fraud which would result from a breach of the agreement on the part of the one accepting the benefits thereof.'" (at Page 306)

> "It has been repeatedly held by this court that in a suit in equity a person for whose benefit a promise is made may enforce it in his own name." (at Page 308)

RELIEF REQUESTED

WHEREFORE, Plaintiffs-Appellants request this Court set aside the Probate Court's Orders, dated February 25, 2003, and March 24, 2003, granting summary disposition in favor of Defendants and direct entry of an Order granting Plaintiffs' Summary Disposition on their Complaint against Defendant, MARIANNE DURUSSEL.

Dated: May 1, 2006

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